



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-21-00212-CV

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**PBEX II, LLC; PBEX OPERATIONS, LLC; PBEX OPERATING, LTD.; WORD B.  
WILSON INVESTMENTS, LP; PRIMERO ENERGY, LLC; CHEL-TRAND HOLDINGS,  
LLC; WPW PERMIAN LLC; CBS PERMIAN, LLC; AND TORCH OIL & GAS COMPANY,  
APPELLANTS**

**V.**

**DORCHESTER MINERALS, L.P. AND DORCHESTER MINERALS OPERATING, L.P.,  
APPELLEES**

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On Appeal from the 142nd District Court  
Midland County, Texas  
Trial Court No. CV53556, Honorable David G. Rogers, Presiding

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**April 28, 2023**

**DISSENTING OPINION**

**Before QUINN, C.J., and DOSS and YARBROUGH, JJ.**

A party seeking to establish title by virtue of adverse possession has the burden to prove “an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.”

TEX. CIV. PRAC. & REM. CODE ANN. § 16.021(1).<sup>1</sup> Before a mineral estate can be possessed adversely, “actual possession of the minerals must occur.” *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 193 (Tex. 2003) (internal citations omitted). Over more than 135 years, our state Supreme Court has emphasized the difference between exercising physical dominion over real property and merely holding a contractual right to property or its proceeds. See *Pool*, 124 S.W.3d at 196–7 (distinguishing between acts to produce minerals and a contractual right to receive royalties from those minerals); *Turner v. Moore*, 81 Tex. 206, 16 S.W. 929 (1891) (holding that adverse possession under a deed did not extend to tracts of land not actually possessed by the adverse claimant); *Word v. Box*, 66 Tex. 596, 602, 3 S.W. 93, 98 (1886) (“Mere color of title, unaccompanied by an actual adverse possession of some part of the land to which the color of title relates, is of no efficacy.”). Because the Court misapplies fundamental legal principles in two ways, I respectfully dissent from affirmance of the summary judgment in favor of Dorchester.

First, when oil and gas interests are at play, an adverse possession claimant is required to actually drill and produce minerals.<sup>2</sup> However, Dorchester, a non-operator, did not drill wells, operate wells, or produce minerals. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.021(1), 16.027. Rather than finding this to be fatal to summary judgment, the Court accepts Dorchester’s invitation to reason that *the operator* adversely appropriated

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<sup>1</sup> *Sun-Key Oil Co., Inc. v. Cannon*, No. 11-07-00025-CV, 2009 Tex. App. LEXIS 1646, at \*11 (Tex. App.—Eastland Mar. 12, 2009, no pet.) (citing *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex.1990)). When a summary judgment movant asserting adverse possession fails to present sufficient evidence supporting each element, the motion should be denied. *Cannon*, 2009 Tex. App. LEXIS 1646, at \*7–8, \*14.

<sup>2</sup> *Pool*, 124 S.W.3d at 193 (citing *Hunt Oil Co. v. Moore*, 656 S.W.2d 634, 641 (Tex. App.—Tyler 1983, writ ref’d n.r.e.)).

minerals “on behalf of Dorchester.” But under the joint operating agreement’s plain terms, the operator disclaimed serving as an agent for the non-operating interest holders; there exists no evidence that the operator otherwise assumed a role of adverse possessor on Dorchester’s behalf.<sup>3</sup> Professor Ernest E. Smith observes that when a JOA defines duties consistent with model forms promulgated by the American Association of Professional Landmen (AAPL), as here, non-operators wield little control:

An agent is subject to the instruction and control of his principal, who can revoke the agent’s authority at will, even if he has contracted not to do so. Although there are some form JOA’s that provide for the operator’s removal without cause, authorize the participants to “exercise overall supervision and control” over operational matters, and establish a voting procedure for exercising such supervision as well as for approving or authorizing a relatively wide range of actions, such forms are typically intended for use only in specific situations, such as federal exploratory units or fieldwide unitization. In the far more commonly used model forms promulgated by the AAPL non-operators do not have anything [approaching] this level of control[.]. The operator is given full control over all operations on the Contract Area, and has equally broad rights with respect to contracting, subject only to the JOA requirement that such contracts be “competitive” and “at the usual rates prevailing in the area.” The non-operators have no power to direct the operator in how to drill or with whom to contract. Of equal or greater significance, the operator cannot be removed at will, but only for cause.<sup>4</sup>

This leads to the second problem. Even if Dorchester’s appropriation by proxy theory might have any footing, it is unavailing here given the summary judgment evidence that the operator could not have acted on Dorchester’s behalf continuously and without interruption throughout the entire 25-year period.<sup>5</sup> The summary judgment evidence

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<sup>3</sup> “Agency is not presumed; a party alleging the existence of an agency relationship bears the burden of proving it.” *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 589 (Tex. 2017).

<sup>4</sup> “The Operator: Liability to Non-Operators, Resignation, Removal and Selection of a Successor,” in 2 OIL AND GAS AGREEMENTS: JOINT OPERATIONS (Rocky Mtn. Min. Law Fdn. 2008) 2.3 – 2.4.

<sup>5</sup> See *Satterwhite v. Rosser*, 61 Tex. 166, 172 (1884) (“The possession must, for all the time fixed by law, be continuously and consistently adverse.”).

reveals that Dorchester's predecessors in interest were non-consenting parties at least twice during the relevant time.<sup>6</sup> As it is described in the JOA, during periods of non-consent, Dorchester was "deemed to have relinquished . . . all of such Non-Consenting Party's interest in the well and share of production therefrom" until the costs of the operation are recovered. During non-consent, the participating working interest holders received the "Non-Consenting Party's share of production, or the proceeds therefrom." Even if the operator could adversely possess minerals as Dorchester's "agent," it strains reason to conclude how this could occur during times when Dorchester had relinquished such interests. These periods of lapse are fatal to Dorchester's adverse possession claim as a matter of law.

I would hold that the trial court's grant of adverse possession via summary judgment is not supported by the law or the evidence. Because this Court upholds the summary judgment, I respectfully dissent.

Lawrence M. Doss  
Justice

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<sup>6</sup> Dorchester correctly points out that Appellants did not raise the "non-consent" issue until after the trial court's grant of summary judgment. But as movant, Dorchester held the burden to conclusively prove each element of adverse possession with a summary judgment record that raises no genuine issue of material fact. See *Cannon*, 2009 Tex. App. LEXIS 1646, at \*11–12.